A MANUAL ON
JURY TRIAL PROCEDURES

Prepared by
The Jury Committee of the Ninth Circuit

Members:
Judge John M. Roll, Chair
Judge Irma E. Gonzalez
Judge Donald W. Molloy
Chief Judge Wm. Fremming Nielsen
Judge Stephen V. Wilson
Judge Thomas S. Zilly

Reporter:
Joe Franaszek

Staff:
Robin Donoghue
Julie Cobb Martel

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Chapter One: Pretrial Considerations

1.1 Right to a Jury Trial

B. Criminal Actions

1. *Criminal Actions*

c. Petty Offense. *Insert after citation to 18 U.S.C. § 1(3):* "Where the maximum term of imprisonment is six months or less, there is a very strong presumption that the offense is petty and defendant is not entitled to a jury trial." *United States v. Ballek*, 170 F.3d 871, 876 (9th Cir.), *cert. denied*, 120 S. Ct. 318 (1999).

Insert at the end of the paragraph: Where "a very large fine, or a very long period of probation, or the forfeiture of substantial property" is imposed, a petty offense may be converted into a more serious offense. *United States v. Ballek*, 170 F.3d 871, 876 (9th Cir.) (restitution did not turn a petty offense into a serious offense), *cert. denied*, 120 S. Ct. 318 (1999).

1.3 Jury Impanelment–Double Jeopardy

A. Jury Trial

Insert at the end of the paragraph: "Jeopardy terminates when the jury reaches a verdict, or when the trial judge enters a final judgment of acquittal. " *United States v. Byrne*, 203 F.3d 671, 673 (9th Cir. 1999) (citing *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)).

1.7 Delegation of District Court's Responsibilities to Magistrate Judge–Accepting Jury's Verdict

A. Criminal Proceedings

2. *Felony Jury Trials*

e. Accepting jury's verdict. *Insert at the end of the paragraph:* However, a magistrate judge has no authority to accept a verdict, without the consent of the parties, where additional action is required. *See United States v. Gomez-Lepe*, 207 F.3d 623, 631 (9th Cir. 2000).

Chapter Two: Voir Dire

2.8 Closed Proceedings Generally [NEW]

"Though criminal trials are presumptively open to the public, *see Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982), a court may order closure of a criminal proceeding if those excluded are afforded a reasonable opportunity to state their objections and the court articulates specific factual findings supporting closure. Such findings must establish the following: '(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.' *Oregonian Publ'g Co. v. United States Dist. Court*, 920 F.2d 1462, 1466 (9th Cir. 1990)." *Unabom Trial Media Coalition v. United States Dist. Court*, 183 F.3d 949, 951 (9th Cir. 1999) (citations omitted).

2.11 Recurring Voir Dire Problems (renumbered from 2.10)

A. Civil Voir Dire

1. *Juror Veracity*

Insert after Couglin v. Tailhook Ass'n: See also Pope v. Man-Data, Inc., 209 F.3d 1161, 1164 (9th Cir. 2000) (error for district court to grant new trial where neither dishonesty nor bias of juror was demonstrated, notwithstanding juror's failure to disclose requested information regarding litigation and collection action history).

B. Criminal Voir Dire

2. *Areas to be Covered*

a. Law enforcement officers. *Insert at the end of the paragraph:* "[W]hether a question need be asked about police credibility depends on various case-specific circumstances . . . ." *Paine v. City of*

Lompoc, 160 F.3d 562, 565 (9th Cir. 1998) (no error on facts presented).

e. Bias or prejudice based on race. *Insert after United States v. Rosales: See also United States v. Sarkisian,* 197 F.3d 966, 979 (9th Cir. 1999) (even assuming "a reasonable possibility that racial or ethnic prejudice might have influenced the jury, the district court's questions regarding the defendants' ethnicity, the use of interpreters, and the jurors' abilities to serve impartially [] were all reasonably sufficient to test the jury for bias and partiality" (citation omitted)), *cert. denied*, 120 S. Ct. 2230 (2000).

f. Willingness to follow law. Where it appears that a prospective juror disagrees with the applicable law, the court should inquire as to whether the juror is nevertheless willing to follow the law. *See United States v. Padilla-Mendoza*, 157 F.3d 730, 733 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1084 (1999).

g. Supplemental questions. "It is wholly within the judge's discretion to reject supplemental questions proposed by counsel if the voir dire is otherwise reasonably sufficient to test the jury for bias or partiality." *Paine v. City of Lompoc*, 160 F.3d 562, 564-65 (9th Cir. 1998) (quoting *United States v. Powell*, 932 F.2d 1337, 1340 (9th Cir. 1991)).

4. *Jury Panel's View of Defendant in Handcuffs*
[*Section omitted.*]

C. Recurring Problems Regarding Shackled or Handcuffed Defendant

1. *Shackling*

"Because visible shackling during trial is so likely to cause a defendant prejudice, it is permitted only when justified by an essential state interest specific to each trial." *Rhoden v. Rowland*,

172 F.3d 633, 636 (9th Cir. 1999) (citing *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986)).

2. *View of defendant in restraints*

"A jury's brief or inadvertent glimpse of a defendant in physical restraints outside of the courtroom," absent actual prejudice, does not warrant relief. *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999) (citations omitted).

3. *Restraints generally*

"[S]hackling, like prison clothes, is an indication of the need to separate a defendant from the community at large, creating an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy. Therefore, '[i]n the presence of the jury, [the defendant] is ordinarily entitled to be relieved of handcuffs, or other unusual restraints, so as not to mark him as an obviously bad man or to suggest that the fact of his guilt is a foregone conclusion.'" *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999) (alteration in original) (quoting *Stewart v. Corbin*, 850 F.2d 492, 497 (9th Cir. 1988)).

2.12 Challenges for Cause (renumbered from 2.11)

B. Erroneous Overruling of Challenge for Cause

Replace existing text with: If a defendant, by exercising a peremptory challenge, cures the erroneous denial of a challenge for cause, the defendant has been deprived of no rule-based or constitutional right. *See United States v. Martinez-Salazar*, 120 S. Ct. 774, 777 (2000).

2.13 Peremptory Challenges (renumbered from 2.12)

B. Criminal

1. *Number of peremptory challenges*

Insert after chart: The joinder of two or more misdemeanor charges for trial does not entitle a defendant to ten peremptory challenges. *See United States v. Machado*, 195 F.3d 454, 457 (9th Cir. 1999).

2.14 *Batson* Challenges

B. *Batson* Procedure

1. *Three-Step Process*

Insert after Purkett v. Elem: See also Stubbs v. Gomez, 189 F.3d 1099, 1104 (9th Cir. 1999), *petition for cert. filed*, U.S. Apr. 18, 2000 (No. 99-9429).

5. *No specific findings required*

"Neither *Batson* nor its progeny requires that the trial judge make specific findings, beyond ruling on the objection." *United States v. Gillam*, 167 F.3d 1273, 1278 (9th Cir.) (citation omitted), *cert. denied*, 120 S. Ct. 235 (1999).

2.16 Dual Juries [NEW]

The Ninth Circuit has held that the use of dual juries does not violate due process. *See Lambright v. Stewart*, 191 F.3d 1181, 1186 (9th Cir. 1999) (en banc) (federal habeas proceeding).

Chapter Three: The Trial Phase

3.8 Successive Cross-Examination

C. Defendant's Refusal to Answer Questions on Cross-Examination (Criminal)

Substitute the following for the first paragraph: "When a defendant refuses to answer questions on cross-examination, the district court may impose one or more of the following sanctions: (1) permit the prosecution to comment on the defendant's unprivileged refusal to answer; (2) permit the prosecution to impeach the defendant's direct testimony by continuing to elicit his unprivileged refusal to answer; (3) instruct the jury that it may take the defendant's refusal to answer various questions into account when reaching a verdict; and/or (4) strike the defendant's direct testimony." *United States v. King*, 200 F.3d 1207, 1217 (9th Cir. 1999) (citation omitted).

3.11 Tape-recordings–Admissibility of Tape Excerpts and/or Translated Transcript [NEW]

A. Generally

"A recorded conversation is generally admissible unless the unintelligible portions are so substantial that the recording as a whole is untrustworthy." *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir.) (citations omitted), *cert. denied*, 120 S. Ct. 261 (1999).

B. Preferred Procedure Regarding Accuracy of Transcripts

"Generally, the Court reviews the following steps taken to ensure the accuracy of the transcripts: (1) whether the court reviewed the transcripts for accuracy, (2) whether defense counsel was allowed to highlight alleged inaccuracies and to introduce alternative versions, (3) whether the jury was instructed that the tape, rather than the transcript, was evidence, and (4) whether the jury was allowed to compare the transcript to the tape and hear

counsel's arguments as to the meaning of the conversations. " *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir.) (citation omitted), *cert. denied*, 120 S. Ct. 261 (1999).

C. Foreign Language Tapes

Where a foreign language tape has been translated, the general requirement that the jury be told that the tape and not the transcript are the evidence no longer applied. *See United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir.), *cert. denied*, 120 S. Ct. 261 (1999).

D. Video-Taped Depositions–Immigration Case

8 U.S.C. § 1324(d) states: "Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) of this section who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence." This statute "simply allows the introduction of video-taped testimony 'notwithstanding any provision of the Federal Rules of Evidence.'" *United States v. Santos-Pinon*, 146 F.3d 734, 736 (9th Cir. 1998) (by failing to object to the release of witnesses, defendant waived any objection regarding the government causing witness to be unavailable, as required for use of video-taped deposition).

3.18 Defendant's Right to Testify [NEW] (Insert after Mini-Arguments During Trial, renumbered 3.17.)

Although a defendant's right to testify is well established, *Rock v. Arkansas*, 483 U.S. 44, 51 (1987), a defendant must assert the right to testify before the jury has reached a verdict. *See United States v. Pino-Noriega*, 189 F.3d 1089, 1095-96 (9th Cir.), *cert. denied*, 120 S. Ct. 453 (1999).

3.19 Closing Argument

B. Response to Objectionable Closing Argument

Insert the following as new first paragraph: The district court has a duty to dispel prejudice from the government's argument. *See United States v. Rodrigues*, 159 F.3d 439, 450-51 (9th Cir. 1998), *amended by* 170 F.3d 881 (9th Cir. 1999) (where district court did not "rebuke" government's counsel for "gratuitous attack on the veracity of defense counsel," district court took inadequate steps to dispel prejudice).

3.20 Judgment of Acquittal–Jeopardy [NEW]

The trial court's oral granting of a motion for judgment of acquittal, without an entry of judgment, and subsequent vacating of the acquittal, does not violate double jeopardy prohibitions. *See United States v. Byrne*, 203 F.3d 671, 674-75 (9th Cir. 2000).

Chapter 5: Jury Deliberations

5.1 Jury Questions During Deliberations

F. Requests for Readbacks of Testimony

1. *In General*

Insert at the end of the third paragraph: See also La Crosse v. Kernan, 211 F.3d 468, 474 (9th Cir. 2000) ("A criminal defendant has a constitutional right to be present during the readback of testimony to a jury" and "must personally waive his right to be present at the readback." (citations omitted)).

5.2 Communications with a Deliberating Jury

E. Ex parte contacts

Ninth Circuit precedents "distinguish between introduction of 'extraneous evidence' to the jury, and *ex parte* contacts with a juror that do not include the imparting of any information that might bear on the case." *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv., Co*, 206 F.3d 900, 906 (9th Cir.), *petition for cert. filed*, U.S. July 14, 2000 (No. 00-90). "'Where ex parte contacts are involved, the defendant will receive a new trial only if the court finds 'actual prejudice to the defendant.'" *Id*. at 906 (quoting *United States v. Maree*, 934 F.2d 196, 201 (9th Cir. 1991)).

F. Jury Tampering

"In a criminal case, any . . . tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . ." *Remmer v. United States*, 347 U.S. 227, 229 (1954). *See also United States v. Dutkel*, 192 F.3d 893, 894-95 (9th Cir. 1999) (co-defendant's tampering with jury required reversal of defendant's convictions unless government could show there was no reasonable possibility that tampering affected jury's decision as to defendant).

5.3 Using Less than Twelve Jurors and Seating Alternate Jurors (Criminal)

C. Just Cause to Excuse Juror–Rule 23(b)

Insert after the third paragraph:

1. *Excusing Deliberating Juror Where Reason is Based on Juror's View of Case*

"[I]f the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror. Under such circumstances, the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial." *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) (emphasis in original). *See also United States v. Beard*, 161 F.3d 1190 (9th Cir. 1998).

2. *Necessity for Evidentiary Hearing*

"An evidentiary hearing is not mandated *every* time there is an allegation of jury misconduct or bias. Rather, in determining whether a hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993). *See also United States v. Hanley*, 190 F.3d 1017, 1031 (9th Cir.1999) (on facts presented, district court did not err in refusing to conduct evidentiary hearing regarding whether a juror should have been excused).

5.4 "*Allen*" Charge

G. De Facto *Allen* Charge

Communications with a deliberating juror by court staff may constitute a de facto *Allen* charge. *See Weaver v. Thompson*, 197 F.3d 359, 366-67 (9th Cir. 1999) (bailiff's communication to deliberating jury that jury had to reach a verdict on all counts constituted an impermissible de facto *Allen* charge).

Chapter 6: Post Verdict Considerations

6.3 Post-Verdict Evidentiary Hearing Regarding Extrinsic Evidence

Insert at the end of the second paragraph: "Rule 606(b) of the Federal Rules of Evidence prohibits a juror from testifying about the jury deliberations or how the jurors reached their conclusions unless 'extraneous prejudicial information was improperly brought to the jury's attention.'" *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1140 (9th Cir.) (error for district court to grant new trial based on juror's statements to the press regarding the impact of evidence), *cert. denied*, 120 S. Ct. 582 (1999).